

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS RIVERA,	§	
	§	No. 65, 2012
Defendant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	
	§	Cr. I.D. No. 1102017217
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 8, 2012

Decided: August 21, 2012

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 21st day of August, 2012, on consideration of the briefs of the parties, it appears to the Court that:

1) Luis Rivera appeals from his conviction, following a jury trial, of trafficking in heroin, possession with intent to deliver, possession of drug paraphernalia, maintaining a dwelling, tampering with physical evidence, and unlawfully dealing with a child. He argues that the trial court erred in admitting into evidence his video recorded statement to the police. He did not move to suppress the statement, but argues on appeal that it was inadmissible because he was too intoxicated to

knowingly and voluntarily waive his Fifth Amendment rights. We find no merit to this argument and affirm.

2) In February 2011, probation officers were executing an administrative search of a probationer's Newark apartment, and found Rivera and his young son. Rivera testified that he had been living there. During the search, the officers discovered bags of heroin and drug paraphernalia. They arrested Rivera, and brought him to New Castle County Police Headquarters.

3) Detective Brian Shahan interviewed Rivera. Shahan began by reading Rivera's *Miranda* rights, and getting Rivera's signature on the waiver form. During the interview, Rivera discussed both his use and sale of heroin. As part of that discussion, Rivera told Shahan that he had used 15 bags of heroin that day.

4) In June 2011, Rivera filed his own motion to suppress, which was forwarded to his attorney. But Rivera's attorney took no action. On the day of trial, Rivera complained that he was not being represented "right"¹ because his counsel failed to file the motion to suppress. The court asked counsel whether he had viewed the tape, and counsel said yes. The court then said, "[y]ou made a professional judgment that

¹ Appellee's Appendix, B-1.

there was no merit in that defense or that request”² Counsel did not reply, and the discussion moved to other matters.

5) At trial, Rivera testified that he was high on heroin during the police interview; that he was feeling sick because he knew he would be going through withdrawal; and that he lied to the police. He was convicted on all charges.

6) This Court will only review questions fairly presented to the trial court.³ Rivera did not move to suppress the video recording, but he asks this Court to review his claim under the plain error standard. Plain error is error that is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁴ But plain error review is “predicated on oversight, as opposed to a tactical decision of counsel.”⁵ The trial transcript establishes that Rivera’s counsel was given the opportunity to present a motion to suppress before trial began, but declined. Thus, Rivera’s claim is waived.

² Appellee’s Appendix, B-2.

³ Supr. Ct. R. 8.

⁴ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁵ *McCullough v. State*, 2010 WL 2696534 at *2 (Del. Supr.).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice